

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 196 OF 2007.  
ALONG WITH  
WRIT PETITION NO. 197 OF 2007.**

Vinaychandra Sharadchandra Dongre. ... Petitioner.  
(In both petitions)

Versus.

Tanuja Vinaychandra Dongre. ... Respondent.  
(In both petitions)

Shri Pradeep Sancheti with Shri S.Deshmukh for the  
Petitioner.

Shri Ajit Kulkarni with Shri Hitesh Vyas for the  
Respondent.

**CORAM : ABHAY S.OKA, J.**

**DATED : 8th March, 2007.**

**P.C.:**

1. Submissions of the learned Counsel appearing for the parties were heard on the last date. The Petitioner is the husband and the Respondent is the wife. The Respondent filed a petition under the Hindu Marriage Act, 1955 for a decree of divorce against the Petitioner on the ground of cruelty. In the said petition an application under section 24 of the said Act of 1955 was made. The said application was contested by the Petitioner. The learned Judge of the Family Court by order dated 17th January 2006 allowed the said application and directed the Petitioner to pay an interim maintenance at the rate of Rs.10,000/- per month

to the Respondent and two children from the date of the Application. On 30th August 2006, the Respondent applied before the Family Court praying for striking out the defence of the Petitioner in the said petition on account of non-payment of maintenance. On 21st September 2006, the learned Judge passed an order on the said Application directing the Petitioner to clear the arrears of interim maintenance and litigation expenses on the arrival of the Petitioner to India from abroad atleast within three weeks from the date of that order. By further order dated 11th October 2006, the learned Judge passed an order that in view of the order dated 21st September 2006, the defence of the Petitioner stands struck out automatically.

2. These petitions have been filed under Article 227 of the Constitution of India. In Writ Petition No.196 of 2007, the challenge is to the order dated 11th October 2006 by which the defence of the Petitioner has been struck out. In Writ Petition No.197 of 2007, the challenge by the Petitioner-husband is to the order dated 17th January 2006 by which interim maintenance was ordered to be paid.

3. The submission of the learned Counsel for the Petitioner is that the defence cannot be struck out unless it is established that there is deliberate and

wilful default or breach on the part of the Petitioner of the order directing payment of interim alimony. He submitted that only on the ground of failure of the Petitioner to comply with the order of payment of interim alimony, the defence cannot be struck out without recording satisfaction that there was deliberate and wilfull default on the part of the Petitioner. He submitted that a sum of Rs.5 lakhs is already received by the Respondent way back in the year 2000 when a flat of the Petitioner was sold by the Respondent to one Ms.Meghana Kulkarni. He submitted that a pursis was filed by the Petitioner before the trial Court pointing out that the said amount of Rs.5 lakhs should be adjusted against the arrears of payment of maintenance. He submitted that in view of this position, it was obvious that there was no wilful default on the part of the Petitioner.

4. He submitted that very serious allegations have been made in the petition filed by the Respondent and as a result of the order of striking out the defence of the Petitioner, there will be a judgment in favour of the Respondent in the main petition on the said ground of default. He submitted that in a petition like this, there could not be any judgment on account of default or admission as held by this Court in a decision reported in 61 Bom.L.R. page 431 (Mrs.Sushila Mahendra Nanavati

v/s. Mahendra Manilal Nanavati). He submitted that the order of payment of interim alimony could not have been passed by the learned trial Judge as the Petitioner has no source of income. The learned Advocate for the Respondent supported the impugned orders.

5. I have considered the submissions. A query was earlier made to the learned Counsel for the Petitioner as to whether the Petitioner was ready and willing to deposit the arrears of maintenance without prejudice to his rights and contentions. On instructions of the Petitioner, who was personally present in Court, the learned Counsel appearing for the Petitioner stated that the Petitioner is not in a position to pay the amount of maintenance. It is an admitted position that as of today the Petitioner has not paid any amount whatsoever on the basis of the order dated 17th January 2006 passed by the learned trial Judge of the Family Court.

6. In so far as the Writ Petition No.197 of 2007 is concerned, the order dated 17th January 2006 has been impugned by which the interim alimony has been ordered to be paid by the Petitioner. It is pertinent to note that this petition is filed on 5th December 2006. In the meanwhile, the Respondent applied for striking out of the defence of the Petitioner and there were two separate orders passed on the said application. It is

pertinent to note that only after the defence of the Petitioner was ordered to be struck out, he has filed the writ petition impugning the order dated 17th January 2006 by which he was directed to pay interim maintenance. In the Writ Petition No.197 of 2007, there is absolutely no explanation as to why the petition could not be filed earlier, when the order was passed on 17th January 2006. In fact in paragraph 16, it is averred that the Petitioner applied for certified copy of the order on 27th November 2006 and the same was ready on 28th November 2006. The very fact that the Petitioner applied for certified copy as late as on 27th November 2006 shows that there was no intention on the part of the Petitioner to challenge the order dated 17th January 2006 earlier and it is only when his defence was ordered to be struck out, the present petition challenging the grant of interim maintenance has been filed. The Petition therefore deserves to be rejected only on the ground of delay and laches.

7. Apart from these facts, I find that the order dated 17th January 2006 is passed on a prima-facie consideration of the material on record. The learned Judge of the Family Court has referred to the admission of the Petitioner in his reply Exh.20 that the Petitioner was getting a salary of Rs.35,000/- per month. The learned Judge also considered the contention

raised that subsequently he was forced to resign from the job and he had no source of income. The learned Judge has referred to the admitted position that the family of the Petitioner was leading a lavish life style. Considering all these aspects, the interim alimony of Rs.10,000/- has been fixed for the Respondent-wife and two children who are taking higher education. A Civil Application has been filed in the writ petition pointing out that a flat allegedly held by the Petitioner has been sold in the year 2000 and a sum of Rs.5 lakhs received by way of consideration is with the Respondent. However, this contention was available to the Petitioner earlier as the application for interim alimony was filed in 2003 and was decided on 17th January 2006.

8. Hence there is no merit in the Writ Petition No.197 of 2007 and the same deserves to be rejected on the ground of delay and laches as well as on merits.

9. Now turning to the Writ Petition No.196 of 2007, the submission of the learned Advocate for the Petitioner is that there is no deliberate and wilful default on the part of the Petitioner and therefore, in view of the settled law, there could not have been an order striking out the defence of the Petitioner. The

submission is that the Petitioner has no means to pay. It must be noted here that from 17th January 2006 till December 2006, the Petitioner has not challenged the order directing payment of alimony. No application was made by the Petitioner for modification of the said order till date. An application for striking out the defence was filed by the Respondent on or about 30th August 2006. In the order dated 21st September 2006 passed on the said application, the learned trial Judge has noted that the only submission made on behalf of the Petitioner was that at the relevant time he was out of India and after his return to India in the last week of September 2006, he will pay the arrears of interim maintenance. The said observation has been made in paragraph 4 of the order dated 21st September 2006. A reply was filed to the said application for by the Petitioner. In the said reply, the Petitioner categorically admitted that he has not paid any amount towards interim maintenance to the Respondent-wife and the children. According to him, the Respondent had agreed not to press the said application for striking out the defence. In paragraph 8 of the said reply, it is stated that the issue of maintenance will be resolved only after the Petitioner returned to India. In the said reply, in paragraph 4, a specific contention has been raised that Petitioner was not earning sufficient money as he was working in the field in Malaysia. Thus

when the said reply was filed, the Petitioner was earning livelihood in a foreign country i.e. Malaysia. The learned trial Judge did not strike out the defence immediately. By the order dated 21st September 2006, an opportunity was granted to the Petitioner to pay the maintenance amount. Instead of paying the maintenance amount, a purshis was filed by the Petitioner wherein it was stated that a sum of Rs.5 lakhs received by the Respondent in the year 2000 was held by her as a trustee and the Petitioner had no objection for adjusting the said amount towards arrears of maintenance. The same was the submission made in the written argument filed by the Petitioner.

10. The sum and substance of what is stated above is that at no stage at least till 21st September 2006, the Petitioner has come out with a clear case that he is not in a position to pay the maintenance amount. The submission which is recorded in the order dated 21st September 2006 is that the Petitioner will clear the arrears of maintenance after he returned from Malaysia. The Petitioner was admittedly working in Malaysia for livelihood. However, after returning to India, he took a stand that he has no means and therefore, is unable to pay the maintenance. If the aforesaid conduct of the Petitioner is examined right from the date of passing of the order dated 17th January 2006, there cannot be any

other conclusion save and except the conclusion that the Petitioner had deliberately and wilfully not complied with the order for payment of maintenance.

11. Even if the defence of the Petitioner is struck out, it is obvious that he will be entitled to a right of limited cross-examination of the Respondent and her witnesses as held by a Division Bench of this Court in the case of Sheshrao R.Ingale v/s. Shilpa S.Ingale [2005(1) Mah.L.J. page 188].

12. Earlier the Petitioner was drawing a handsome salary of Rs.35,000/- per month. Thereafter he took up an employment in Malaysia. But he has not paid any amount towards interim alimony till today. The interim alimony was payable not only to his wife but to the children who are taking education in the city of Pune. In such circumstances, in a petition under Article 227 of the Constitution of India, it is not possible to interfere with the order of striking out of defence at the instance of the Petitioner in view of his aforesaid conduct. However, with a view to give a last opportunity to the Petitioner, a reasonable time deserves to be granted to pay the arrears of maintenance.

13. Hence the following order is passed:

- (i) Writ Petition No.197 of 2007 and Civil Application Stamp No.30155 of 2006 are rejected.
- (ii) Writ Petition No.196 of 2007 is rejected. However, if the Petitioner deposits the entire arrears of maintenance as of today within a period of six weeks from today, the order dated 11th October 2006 shall stand quashed and set aside, and the Petitioner will be entitled to defend the petition.
- (iii) For a period of six weeks from today, the final hearing of the petition filed by the Respondent will not proceed.
- (iv) The Petitioner is directed to pay total costs of Rs.10,000/- to the Respondent being the costs payable in these two petitions. Costs to be paid within a period of four weeks.

**Judge.**